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No. 640

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

THE UNITED STATES OF AMERICA, APPELLANT

v.

CAROLENE PRODUCTS COMPANY, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE CAROLENE PRODUCTS COMPANY

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STATEMENT

The facts as set out in Appellant's brief require some slight elaboration and comment. The first count of the indictment charges the shipment in interstate commerce from Illinois to Missouri, by defendant, of an adulterated article of food, injurious to the public health, a product of condensed and concentrated skimmed milk to which had been added a fat or oil other than milk fat, to wit cocoanut oil so that the resulting product "Milnut" was

in imitation of and semblance of milk, cream, skimmed milk, and concentrated milk. The second count is practically the same except that the product was known as "Carolene" and the shipment was to other consignees.

While the decision appealed from is in form, that of Judge Adair, rendered October 19, 1937, it is in fact an appeal from the decision of Judge Louis Fitzhenry rendered 1934, adopted by Judge Adair. The violations charged against appellee were the same in each case, the indictment now before this court being a device adopted by the government to appeal from a decision rendered three years earlier, and under the protection of which appellee had been operating.

STATUTES

The statute, the constitutionality of which is at issue, has been accurately quoted in Appellant's brief, p. 2, 3, 4.

SUMMARY OF ARGUMENT

1. Similar state statutes have recently been held void by state supreme courts as prohibiting healthful, wholesome, harmless foods. The statute is not a regulation but a prohibition, invading the powers reserved to the states to legislate with respect to health and fraud, and exceeds the limitations placed on Congress by the Constitution. It does not deal with an evil or injurious subject, and, has no relation to the preservation of the health, morals or safety of the public, but is the result of skillfully directed agitation by competitors. The compounds prohibited are neither adulterated nor misbranded under the general laws and fraud will never be presumed. Compounds of

the same ingredients are recognized as proper subjects for transportation and are permitted when in imitation or semblance of butter.

2. The statute violates the due process of law provisions of the Constitution, is a special law, a legislative judgment and decree and an arbitrary exertion of legislative power, usurping the functions of the court and jury, and containing a conclusive presumption as to adulteration, injury to health and fraud.

3. The statute is invalid in that the classification which it makes in forbidding the shipment in interstate commerce of the compound or mixture of milk and animal or vegetable fats in the imitation and semblance of milk but not forbidding such transportation of mixtures and compounds of milk and animal or vegetable fats in imitation or semblance of butter is arbitrary and unreasonable and deprives defendant of its property without due process of law.

4. Appellant has sought to confine the application of the statute to compounds of "skimmed milk" while, in fact, it relates to compounds of cream, milk, or skimmed milk in any form. Substitutes for every necessity of life are common and desirable. Vitamins are subjects of controversy and no standard for vitamins has ever been attempted by statute. Hebe v. Shaw is not applicable to the interpretation of a federal law as it set a standard for State not Federal statutes. The statute was passed by powerful majorities to eliminate competition and not for the preservation of the health, safety or comfort of the public.

ARGUMENT

I

SIMILAR STATE STATUTES HAVE RECENTLY BEEN HELD VOID BY STATE SUPREME COURTS AS PROHIBITING HEALTHFUL, WHOLESOME, HARMLESS FOODS. THE STATUTE IS NOT A REGULATION BUT A PROHIBITION, INVADING THE POWERS RESERVED TO THE STATES TO LEGISLATE WITH RESPECT TO HEALTH AND FRAUD, AND EXCEEDS THE LIMITATIONS PLACED ON CONGRESS BY THE CONSTITUTION. IT DOES NOT DEAL WITH AN EVIL OR INJURIOUS SUBJECT, AND HAS NO RELATION TO THE PRESERVATION OF THE HEALTH, MORALS OR SAFETY OF THE PUBLIC, BUT IS THE RESULT OF SKILLFULLY DIRECTED AGITATION BY COMPETITORS. THE COMPOUNDS PROHIBITED ARE NEITHER ADULTERATED NOR MISBRANDED UNDER THE GENERAL LAWS AND FRAUD WILL NEVER BE PRESUMED. COMPOUNDS OF THE SAME INGREDIENTS ARE RECOGNIZED AS PROPER SUBJECTS FOR TRANSPORTATION AND ARE PERMITTED WHEN IN IMITATION OR SEMBLANCE OF BUTTER.

While this case comes before this Court on the question of the sustaining of a demurrer by the district court, (U. S. v. Carolene, 7, Fed. Sup. 500), the reports of Congressional Committees, quoted in that opinion and in Appendix A of appellant's brief present an array of purported facts all very prejudicial to appellant.

This case coming before this Court in this way, ap-

pellant has no opportunity to dispute or disprove these statements, and under the provisions of the statute would have no opportunity at a trial of the indictment to present facts or evidence that a product such as appellee is charged with shipping, is not in fact an adulterated article of food, that it is not injurious to health, and that its sale is not a fraud on the public.

However, there are decisions of four State Supreme Courts, of which this Court may take judicial notice, wherein facts contrary to those set out in the Congressional Reports and as presented by witnesses under oath are fully set out, and to these decisions, appellee respectfully invites this Court's attention. They are:

People v. Carolene Products Co., 345 Ill. 166, 177 N. E. 698 (1931)

Carolene Products Co. v. Thomson, 276 Mich. 172, 267 N. W. 608 (1936)

Banning v. Carolene Products Co., 131 Neb. 429, 268 N. W. 313 (1936)

Carolene Products Co. v. Walter McLaughlin, 365 Ill. (15 N. E. (2d) 477) (1937)

The main question involved is as to whether the constitution gives Congress the power to prohibit the interstate transportation of filled milk as defined by the statue. The test of this power is clearly stated by this Court in Kentucky Whip and Collar Co. v. Ill C. R. Co. 299 U. S. 334, 351, 81 L. Ed. 270, 277 where this Court said:

"The pertinent point is that where the subject of commerce is one as to which the power of the

> State may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy."

From this statement it would seem that if the subject is one that a State cannot constitutionally prohibit, that Congress has no power to prohibit what a state may desire. In the above cited cases these state courts had before them the records of lengthy trials and each held the product to be a healthful, wholesome, growth producing food product containing nothing deleterious or injurious to health.

This fact was stipulated in the first Illinois case in 1931. In the second Illinois case in 1936 these facts were proven, the court saying:

> "* * * * * In that case the facts were stipulated, it being agreed that neither evaporated skimmed milk nor cocoanut oil, nor the combination, was harmful or deleterious to health. It was further stipulated that the use of cocoanut oil in oleomargarine was not prohibited by the laws of this State. In the present case these facts were put in issue by the pleadings. The evidence tended, however, to prove the facts which were stipulated in the earlier case. * * *
>
> "The factual situation requires consideration. The plaintiff is a domestic corporation engaged in selling throughout this State two products, called Carolene and Milnut, manufactured by the Litchfield Creamery Company at Litchfield, Illinois. Differing only in name, they are composed of

evaporated skimmed milk to which is added cocoanut oil, the latter being a fat other than milk fat. The cocoanut oil added to the skim milk to replace the extracted butter fact is much less expensive than butter fat. The plaintiff's products can be, and are sold cheaper than regular evaporated milk or condensed milk. Carolene and Milnut have the same consistency, color, taste and odor as regular evaporated milk, and are packed in air-tight cans of the same shape and size as those used by the manufacturers of regular evaporated milk. The principal, if not the only difference between evaporated milk and plaintiff's products is that in the latter the fat content is the fat of cocoanut oil instead of butter fat. The labels on the cans plainly state that the particular product is 'a compound of refined nut oils and evaporated skimmed milk,' giving the proportions of each, and that it is 'not to be sold for evaporated milk.' * * *

"From the evidence it appears that cocoanut oil is a widely used food product, it being the principal ingredient of oleomargarine; that it is used in the manufacture of oleomargarine in much larger relative amounts than in Carolene and Milnut without violating any law of this State; that its digestibility is the same as butter fat; that it is one of the finest vegetable oils on the market, and that it is a wholesome food product. Scientific tests consisting of nutrition experiments showed that Carolene and Milnut, consisting of evaporated skimmed milk and cocoanut oil, were healthful, wholesome foods and that nothing unhealthful or deleterious was contained in them. Similar tests conducted with a typical evaporated milk produced the same results."

The court further said:

"It may be conceded the legislature has no authority to forbid the sale of a known healthy food."

The Michigan Supreme Court said:

"Testimony was taken. It is undisputed that the label correctly states the ingredients of the product; that both skim milk and cocoanut oil have substantial food value; that the product contains the full food values of both; and has no properties harmful to health.

"Because the statute does not differentiate between harmful and harmless foreign oils or fats, it is not an adulteration act.

"The power of the legislature to regulate the production and sale of milk and its derivatives cannot be doubted. But the police power of regulation does not include the absolute prohibition of trade in useful and harmless articles of commerce. Being prohibitory, the act msut be declared invalid.

"The principles involved are well settled and do not need extensive citation of authorities. The constitution guarantees to citizens the general right to engage in any business which does not harm the public. **People v. Berrien Circuit Judge, 124 Mich. 664.** The constitutional right to engage in business is subject to the sovereign police power of the State to preserve public health, safety, morals or general welfare and prevent fraud. In the exercise of the police power there must be not only a public welfare to be conserved or

> public wrong to be corrected, but there must also be a reasonable relation between the remedy adopted and the public purpose."

The Nebraska Supreme Court said:

> "We conclude therefore that Carolene is a nutritious and healthful food and in no way deleterious to health in its ordinary use. Under these facts, the legislature has exceeded constitutional limits in passing this act."

In order that this Court may realize the impressions of a trial judge before whom evidence was presented there is attached hereto as Appendix, a copy of the decision of Justice Stone of the Circuit Court of Sangamon County, Illinois in the case of Carolene Products Company v. McLaughlin (unreported) and this Court's attention is invited to his statements of facts.

From the facts as shown in these decisions, as well as those which this Court judicially know, there is no question but that a compound of milk products and harmless fats, other than milk fats, is a harmless article of food, wholesome, and nutritious, and further that the fact that the compounding resulted in or remained a product resembling some milk product, has no relation to the healthfulness of the product.

The controlling question then is whether it is within the authority of Congress in regulating commerce among the states, to prohibit the transportation in interstate commerce of all mixtures or compounds of any milk product and any fats or oils other than milk fat, solely because the resulting product may be in imitation or sem-

blance of milk. The power to regulate commerce given by the Constitution to Congress is the power to regulate, that is, to prescribe the rule by which commerce is to be governed.

The parts of the statute which is copied in full, Appellant's brief p 2, 3, 4, which Appellant considers pertinent to this appeal provide:

> "It shall be unlawful for any person * * * to ship or deliver for shipment in interstate or foreign commerce any filled milk."

Filled milk is defined as:

> "Any milk, cream, or skimmed milk—to which has been added or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried or desiccated," (Emphasis supplied)

It is declared then:

> "Filled milk as herein defined, is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public."

The rule that under the power given by the Constitution to regulate interstate commerce, there is no authority given to prohibit the shipment of harmless articles is plainly set out in the case of **Hammer v. Dagenhart**, 247 U. S. 251, at page 269, 62 L. Ed. 1101, 38 S. Ct. 529. This court there says:

"In Gibbons v. Ogden, 9 Wheat. 1, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said, 'It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.' In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this Court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate.

* * * *

(271) "'The power conferred is to regulate, and the very terms of the grant would seem to repel the contention that only prohibition of movement in interstate commerce was embraced. And the cogency of this is manifest since if the doctrine were applied to those manifold and important subjects of interstate commerce as to which Congress from the beginning has regulated, not prohibited, the existence of government under the Constitution would be no longer possible.'

* * *

"In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, al-

> though the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended. * * *"

The Court below based its reasoning upon this case and the Child Labor Tax. Case, **Bailey v. Drexel Furniture Co.** 259 U. S. 20; 42 Sup. Ct. Rep. 449, 66 L. Ed. 817. Judge Fitzhenry's decision is so complete and well reasoned that it constitutes a brief in itself.

The power of Congress under the authority given by the Constitution to regulate interstate commerce, has been used in this case to arbitrarily invade the rights of the Appellee in the conduct of its business. This business is lawful in the state where the product is manufactured and from which it was shipped and is protected by injunction in the state into which it was shipped. This point is well illustrated in the case of **Adair vs. United States** 208 U. S. 161, 180, 52 L. Ed. 436, 28 S. Ct. 277 where it is said:

> "It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the 5th Amendment, and as not embraced by nor within the power of Congress to regulate interstate commerce, but, under the guise of regulating interstate commerce, and as applied to this case, it arbitrarily sanctions an illegal invasion of the personal liberty as well as the right of property of the defendant Adair."

The next question is as to the character of the product the transportation of which is prohibited. Interstate

commerce may be closed when its use is necessary to the accomplishment of harmful results.

No harm can result from the transportation of a compound of two healthful, wholesome foods, which have been recognized as proper human foods from the earliest times and to which each year the science of the refinement of vegetable oils is adding others. This Court has for 40 years recognized such compounds in the form of oleomargarine, to be healthful foods. The product involved here is a compound of skimmed milk and vegetable fats other than butter fat, to wit, cocoanut oil. Milk, cream, or skimmed milk in various forms are recognized as proper foods. Cocoanut oil is one of the most widely used vegetable oil foods. Mixtures or compounds of these two are proper and legal and permitted by the Federal Food and Drugs Act of June 30, 1906. The compounds whose shipment is prohibited are harmless. The ingredients may be shipped separately, and compounds of them are freely shipped in the form of oleomargarine, salad dressings and so forth, the shipment of a mixture of them under this law being prohibited only when the resulting product is in imitation or semblance of milk, cream, or skimmed milk, or derivatives thereof. It would seem then that the statute is designed to close interstate transportation to mixtures of milk products and oils and fats only when the compounding results in a mixture which imitates or resembles milk products. If the mixtures do not resemble milk products they may be shipped. The question naturally arises as to what power Congress has to prohibit the manufacture, by prohibiting the shipment of any compound which by nature resembles milk. There is no unnatural or conscious imitation or adulteration, as

the addition of a more wholesome fat to skimmed milk increases rather than lowers its food values. There is no provision respecting coloration, and to make a compound which would not resemble milk, when 94 per cent of a milk product is combined with 6 per cent colorless oil, would require the use of some foreign substance to cause the mixture not to resemble milk in color. This cannot be compelled. In **Collins v. New Hampshire**, 171 U. S. 31, 33, 18 Sup. Ct. Rep. 768, 43 L. Ed. 60, this Court decided that a statute could not be upheld which required oleomargarine to be colored pink to distinguish it from butter. It was said:

> "The statute is in its practical effect prohibitory. It is clear that it is not an inspection law in any sense. It provides for no inspection, and it is apparent that none was intended."

The Filled milk law does not prohibit artificial coloration as do the laws of many states with respect to oleomargarine but it prohibits the shipment in its natural state, which would indicate that if something were done to the product so that it would not resemble a milk product, its shipment would be legal. This is practically the same thing attempted in the Collins case. There, oleomargarine was prohibited unless colored pink. Here Filled Milk is prohibited if it resembles milk; in other words if something were done to it, colored pink, for instance so that it would not resemble milk products in color, or if some foreign substance were incorporated in it so that it would not taste or smell like a milk product, then it could be shipped. The product is sold in its natural state. The statute requires an adulteration as the condition of its shipment. This court in the Collins case

has said this may not be required. Can a product which is skimmed milk concentrated so that all its food values, which are all of the food values of whole milk except the fat, are increased several times, be either required to be made unlike skimmed milk or its transportation in interstate commerce prohibited?

The statute is not an inspection law, a license law, a law establishing a standard of certain ingredients for food, nor since it prohibits the addition to, rather than the subtraction from, it cannot be considered an adulteration law. **Carolene v. Thomson**, 276 Mich. 172, 267 N. W. 608. Neither is it a regulatory law and does not distinguish between the addition of harmless and harmful oils or fats, hence as it shows on its face is just prohibitive.

Just what the limitations upon Congress are and what Congress may not do under the Constitution have not been as often or as clearly set out as have those things which Congress may constitutionally do and which have been held not to be constitutionally limited. Those things to which the limitations of the Constitution do not apply as held by the decisions of this Court are:

1. Diseased livestock, Reid v. Colo. 187 U. S. 137; 47 L. Ed. 108.

2. Lottery tickets, Chapmion v. Ames, 188 U. S. 321; 47 L. Ed. 492.

3. Property owned by interstate carrier, U. S. v. Del. and H. Co. 213 U. S. 266; 53 L. Ed. 836.

4. Adulterated and misbranded foods and drugs,

Hippolete Egg Co. v. U. S., 220 U. S. 45; 55 Law Ed. 364, 31 Sup. Ct. 364.

5. Women for immoral purposes. Hoke v. U. S. 227 U. S. 308; 57 L. Ed. 523; 33 S. Ct. 281.

6. Intoxicating liquors, Clark Dist. Co. v. W. Maryland Ry. Co. 242 U. S. 311; 61 L. Ed. 326, 37 S. Ct. 180.

7. Diseased plants. Ore.-Wash. R. and N. Co. v. Wash. 270 U. S. 87; 70 L. Ed. 482; 46 S. Ct. 279.

8. Stolen Motor Vehicles. Brooks v. U. S. 267 U. S. 439; 69 L. Ed. 699; 45 S. Ct. 345.

9. Kidnapped persons. Gooch v. U. S. 297 U. S. 124; 80 L. Ed. 522; 56 S. Ct. 395.

Those things to which the limitations of the constitution do apply have never been so clearly set out and collected or so often considered. Most of them relate to what a State Legislature may not do, in the exercise of its police and taxing powers. This court has said that in the exercise of its control over interstate commerce the means employed by Congress may have the quality of police regulations, and cover the use of commerce as an agency to promote immorality, dishonesty, or the spread of evil or harm, thus exercising the police power for the benefit of the public within the field of interstate commerce. We believe, then, that the limitations of state police powers to the protection of the health, morals, safety, comfort or general welfare of the people, also applies to such police powers as and when they may be exercised by Congress. The State certainly may prohibit

within its borders the possession of diseased livestock or plants, lottery tickets, the adulteration of foods and drugs, prostitution, intoxicating liquors, theft of property and kidnapping. Congress should not and cannot prevent the transportation of harmless articles the manufacture and sale of which is not subject to the police powers of the state, manufactured in compliance with the laws of the state of manufacture, and whose sale is not prohibited by the laws of the state into which they are transported.

This principle was recognized by the Webb-Kenyon Act of March 1, 1913, the Hawes-Cooper Act of January 19, 1929, and others. These laws, however, did not positively and entirely prohibit the transportation of the article but were true regulations, and further the regulations had some relation to a proper object to be attained.

The constitutional grant to congress is to regulate interstate commerce. This does not give congress authority to control the states in their exercise of the police power over local trade and manufacture. Child Labor Case, (cited above.)

"Beneficent aims, however great or well directed can never serve in lieu of constitutional powers." **Carter v. Carter Coal,** 298 U. S. 238, 291, 80 L. Ed. 1160, 1178; 56 Sup. Ct. Rep. 855.

The general government possesses no inherent power in respect to the internal affairs of the state. Id.

> "The thing to be regulated is the commerce described. In exercising the authority conferred by this clause of the constitution, Congress is powerless to regulate anything which is not com-

merce, as it is powerless to do anything about commerce which is not regulation." id. p. 297, 80 L. Ed. 1182.

This court in **U. S. v. Butler,** 297 U. S. 1, 68; 80 L. Ed. 477, 489; 56 S. Ct. 312 said:

> "The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the Federal Government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end."

Speaking of the powers of Congress the Court said:

> "None to regulate agricultural production is given, and therefore legislation by congress for that purpose is forbidden." * * * "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted."

Agricultural production may not be regulated under the guise of the taxing power.

Rickert Rice Mills v. Fontenot, 297 U. S. 110; 80 L. Ed. 513; 56 Sup. Ct. Rep. 375 **U. S. v. Butler,** 297 U. S. 1 (Supra.)

Regulation of the employment of Child Labor in the States may not be accomplished under the guise of a tax.

Child Labor Tax Case, 259 U. S. 20, 42 S. Ct. 449.

Congress may not regulate the hours of labor of

children in the states by a prohibition against the movement in interstate commerce of ordinary commercial commodities.

Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101, 38 S. Ct. 529.

Congress is without power to regulate the production of milk.

U. S. Seven Oaks Dairy Co. 10 Fed. Sup 995; **Columbus Milk Producers Co-op. Assn. v. Wallace,** 8 Fed. Sup. 1014;

Congress has no power to regulate wages and hours of labor in a local business.

Schechter Poultry Co. v. U. S. 295 U. S. 495, 79 L. Ed. 1570.

Power to regulate commerce embraces the power to protect that commerce from injury. How is commerce injured by shipping a product defined as a mixture of milk products with oils foreign to milk, which resembles a milk product? To give Congress or a State power to prohibit such a product it must be such a product as will injuriously affect the health, morals, comfort or safety of the public. No such charge can truthfully be brought against this product.

The statute declares that it is an adulterated article. It is not adulterated under the general law of the United States or any State. The statute declares it is injurious to health. Common sense knows it is not injurious to health and that Congress permits its shipment in other forms, not resembling milk. The statute declares its sale

constitutes a fraud on the public. Fraud is never presumed and Congress has no authority or jurisdiction to prohibit or punish fraud except against the Government and the statute therefore usurps the power of the state under the cloak of its authority to regulate interstate commerce. In **Plumley v. Massachusetts**, 155 U. S. 461, 472, 15 S. Ct. 154, 39 L. Ed. 222 this court said:

> "If there be any subject over which it would seem the states ought to have plenary control and the power to legislate in respect to which it ought not be supposed was intended to be surrendered to the general government it is the protection of the people against fraud and deception in the sale of food products. * * *"

In **Raher's case**, 140 U. S. 545, 554; 35 L. Ed. 572; 11 Sup. Ct. 865 the court said:

> "The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive," and that, (555) "it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the National Government."
>
> "Health laws of every description" form a portion of that mass of legislation not surrendered to the general government.
>
> **Gibbons v. Ogden**, Wheat. 1, 203, 6 Sup. Ct. Rep. 1, 6 L. Ed. 23.

Barbier v. Connolly, 113 U. S. 27, 31; 5 Sup. Ct. Rep. 357, 28 L. Ed. 923.

Carter v. Carter Coal Co. 298 U. S. 238, 290; 36 Sup. Ct. Rep. 855, 80 L. Ed. 1160.

In the License Cases, 5 Howard 504, 581, 12 L. Ed. 256, 291, this Court said:

"So also, in regard to health and quarantine laws. They have been continually passed by the states ever since the adoption of the constitution, and the power to pass them recognized by acts of Congress.* * * and constantly affirmed and supported by this Court whenever the subject came before it."

If the Congress has the same police power as the states, which is not admitted, then its acts under that power are subject to the same limitations. The four State Supreme Courts cited above have recently held that the manufacture, sale, or possession for sale of Filled Milk as defined by the Act of March 4, 1923, could not be prohibited under the police power of the State, such a statute having no relation to the protection of the health, morals, safety or welfare of the public.

The Supreme Court of Illinois in 1931, in People v. Carolene 345 Ill. 166 177 N. E. 698 said:

"This court has by many decisions upheld the right of the citizen to engage in any occupation not detrimental to the public health, safety and welfare, free from regulation by the exercise of the police power. (Banghart v. Walsh, 309 Ill. 132; Bessette v. People, 193 id. 334; Ruhstrat v.

People, 185 id. 133.) The measures adopted by the legislature to protect the public health and secure the public safety and welfare must have some relation to these proposed ends. (Ritchie v. People, 155 Ill. 98). Rights of property will not be permitted to be invaded under the guise of police regulation. (Bailey v. People, 190 Ill. 28). If it is manifest that the statute or ordinance, under the guise of a police regulation, does not tend to preserve the public health, safety or welfare, it is void as an invasion of the property rights of the individual. People v. Weiner, 271 Ill. 74; Ramsey v. People, 142 id. 380."

The Supreme Court of Michigan in 1936, in **Carolene v. Thompson**, 276 Michigan 172, 267 N. W. 608 said:

"Prohibition of manufacture and sale of a nutritious food product which is harmless to public health cannot be justified under the police power to preserve public health, because the remedy has no reasonable relation to the purpose unless, at least, it appears that other similar products, dangerous to health, are on the market and that prohibition of all is reasonably necessary to protect the public health because of the impracticability of separating the good from the bad. There is no such claim here."

The Supreme court of Nebraska in 1936 in **Banning v. Carolene** 131 Nebraska, 429, 268 N. W. 313 said:

"A citizen clearly has the right to engage in any occupation not detrimental to the public health, safety and welfare. Measures adopted by the legislature to protect the public health and secure the public safety and welfare must have some relation to those proposed ends. If it is apparent

that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety or welfare, it is unconstitutional as an invasion of the property rights of the individual."

The Supreme Court of Illinois in 1936 (the personnel of the court being different from that in 1931, with the exception of one Justice) in **Carolene Products Company, Appellee v. McLaughlin** 365 Ill. 62; 5 N. E. (2) 447 said:

"The question remains whether **Section 2** of the present statute brings the Filled Milk act of 1935 within the scope of the legitimate exercise of the police power. The applicable principles are well settled. The challenged statute constitutes a valid exertion of the police power of the State, if its provisions bear a real and substantial relation to the public health or the protection of the public against fraud. Legislatures may not, however, under the guise of the police power, impose unnecessary and unreasonable restrictions upon the use of private property or the pursuit of useful activities and lawful occupations. (Weaver v. Palmer Bros. Co., 270 U. S. 402; Burns Baking Co. v. Bryan, 264 id. 504; Koos v. Saunders, 349 Ill 442; Frazer v. Shelton, 320 id. 253.) The legislative determination of whether a statute is a proper exercise of the police power is not necessarily conclusive. Whether the means employed have any real, substantial relation to the public health, comfort, safety or welfare, or are essentially arbitrary and unreasonable, is a question which is subject to review by the courts. People v. Belcastro, 356 Ill. 144; Banghart v. Walsh, 339 id. 132; People v. Robertson, 302 id. 442; People v. Steele, 231 id. 340."

The decisions of this court are to the same effect. The rule as set out in **Mugler v. Kansas**, 123 U. S. 623, 661, 31 L. Ed. 205, 210; 8 Sup. Ct. 273 has been accepted. That rule is:

> "* * * * * If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Liggett v. Baldridge 278 U. S. 105; 73 L. Ed. 204.
Lochner v. N. Y. 198 U. S. 45, 62; 49 L. Ed. 937, 944.

This Court in **Nebbia v. N. Y.** 291 U. S. 502, 525; 78 L. Ed. 940 said:

> "And the guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

In **Burns Baking Co. v. Bryan** 264 U. S. 504, 513; 44 S. Ct. 412 (Syl. 2) it was said:

> "It is the duty of the Court to determine whether a regulation challenged under the Constitution has a reasonable relation to, and a real tendency to accomplish the purpose for which it was enacted."

There is no reasonable basis for the conclusion that the act is a health measure. This is shown by the fact

that the law prohibits the addition of any fat or oil other than butter fat to whole milk and cream which contain vitamin A as well as to skimmed milk which contains little vitamin A.

The appellant bases its support of the proposition that filled milk is harmful to public health on the sole proposition that if it be a mixture of skimmed milk and vegetable oils or fats it contains little vitamin A. This contention was well met by the Michigan Supreme Court as follows:

> "The State contends that plaintiff's product is harmful to public health, not in that it has deleterious properties, but because it does not contain vitamin A, an element of whole milk and cream, which inheres in the cream in the process of skimming, which is wholly or substantially absent from skimmed milk, is not found in cocoanut oil, and is an essential of health. Vitamin A is also lacking in other common articles of food. Hence the need for a balanced diet.
>
> "The argument of the State might have force were the statute confined to skimmed milk. But that the act has no concern with the lack of vitamin A is conclusively demonstrated by the fact that (1) it merely prohibits addition to, not subtraction from, milk and its derivatives; (2), the prohibition applies alike to whole milk and cream, which contains vitamin A as to skim milk, which lacks it; and (3) the legislature would be guilty of gross inconsistency in permitting, in other acts, production and sale of skim milk although it does not contain vitamin A, and, in this act, prohibiting sale of skim milk, because it does not contain vitamin A, the addition of the foreign

> oils and fats having no effect upon the presence of such vitamins."

It would have just as little or just as much vitamin A if it were artificially colored red or blue and made to taste differently as it does in its natural state, yet in that case it would not resemble milk and would not be included in the act.

Milk which consists of proteins, carbohydrates, fats and minerals has one distinguished feature. The fats may be separated and by agitation solidified into butter which in its distinct form is one of the leading food products in the United States. This leaves the other food properties constituting over 2-3 of the food values of milk unchanged. This part of the original product is known and is defined as "skimmed milk." Its sale is permitted and regulated and its greater use urged by leading food authorities and even by the United States Department of Agriculture. Sherman, **Science of Nutrition,** p. 193 and **Year Book of Agriculture,** 1935, p. 172. Extensive experiments conducted by Professor Langworthy of the United States Department of Agriculture showed that coconut oil is equally digestible with butter fat; **U. S. Department of Agriculture Bulletin Number 505.**

In **Commissioner v. Hufnal,** 185 Pa. 376, 380, 39 A 1052 the court said:

> "We are constrained to hold therefore that skimmed milk is not adulterated milk even within the very broad and peculiar meaning of the word adulterated in the Act of 1895. Undoubtedly if sold as whole milk or even as milk without any descriptive epithet, it would be within the statute

> as milk from which a valuable constituent had been abstracted. But, even though it has lost its most valuable ingredient, skimmed milk is still a useful and important article of consumption and its sale has never been prohibited. When sold candidly under its own name there is nothing legally or morally wrong in the transaction, and, 'skimmed milk' we understand to be the generic term by which is meant milk from which its natural cream has been taken in part or in whole."

The Pennsylvania Milk Control Board has established a minimum price for skimmed milk of 8 or 9 cents per quart.

Its use in combination with other fats however, has been persistently opposed by the powerful dairy interests where such compounds have come in competition with butter or milk products. These interests from 1880 to date have secured the passage of restrictive or prohibitory laws with respect to the use of such compounds in competition with butter and from 1920 to date, when the compounds came in competition with milk. Thus, the statute here in question, and similar prohibitory laws in 21 states were enacted. With one exception when the constitutionality of these prohibitive laws have been passed upon by the highest state courts, they have been held void. That one case was **State v. Emery** 178 Wis. 147, 1897 N. W. 564 in 1922. That court, however, reversed every holding in **Jelke v. Emery,** 193 Wis. 311, 214 N. W. 369 in 1927.

There is no more reason to absolutely prohibit the shipment in interstate commerce of filled milk as defined in the statute than there was to prohibit the use of shoddy

in the manufacture of bedding in the recent case of **Weaver v. Palmer Bros. Co.**, 270 U. S. 402, 410; L. Ed. 654, 656, 46 Sup. Ct. Rep. 320 where this Court said:

> "The question for decision is whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the due process clause or the equal protection clause.
>
> • • •
>
> (412) "There was no evidence that any sickness or disease was ever caused by the use of shoddy.
>
> • • •
>
> "Shoddy filled comfortables made by appellee are useful articles for which there is much demand. And it is a matter of public concern that the production and sale of things necessary or convenient for use should not be forbidden.

After describing the provisions of the statute for inspection tagging and labeling the court further said: (P. 415)

> "Obviously these regulations or others that are adequate may be effectively applied to shoddy-filled articles. • • •
>
> "The business here involved is legitimate and useful and while it is subject to reasonable regulations the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the 14th amendment."

Citing:

Adams v. Tanner 244 U. S. 590, 596, 61 L. Ed. 1336, 1343; 37 S. Ct. 662.

Meyer v. Nebraska 262 U. S. 390, 67 L. Ed. 1042; 43 S. Ct. 625.

Jay Burns Packing Company v. Bryan, 264 U. S. 504, 68 L. Ed. 813; 44 S. Ct. 412.

Imitation and semblance of a product like filled milk which to be successfully or extensively sold must be packed in hermetically sealed cans, depends entirely on the labels on the containers since the product itself cannot be seen, smelled or tasted until the container is opened, and the purchase is first made because the label for some reason attracts the notice of the customer. If the provisions of the Food and Drugs Act are not adequate, further regulation of labels might be required as is done by statute in several states. For example, Michigan requires that the package be labelled "Filled Milk" in prescribed size letters, and cards displayed where sold or used.

Certainly the product is useful and in demand, and if needed, subject to reasonable regulation, but is no more subject to absolute prohibition than was the shoddy-filled beddings.

This Court as well as all lower Federal Courts have never departed from the principal that prohibition will not be permitted where regulation will accomplish the ends desired. In the very recent case of **Lone Star Gas Co. v. City of Fort Worth**, 93 Fed. (2) 584, the Circuit Court of Appeals of the 5th Circuit enjoined the enforcement of an ordinance prohibiting the addition of air to fuel gas as being unreasonable and arbitrary and denying due process. The court said:

"We are of opinion that the evidence here sustains the burden, and shows an interference with an established business and plant by prohibition when regulation would answer, so unreasonable as to be contrary to the charter power, and a taking of property without due process of law. That .. police power must be exercised reasonably and within the limits of public necessity when individuals will be injuriously affected is well established. Weaver v. Palmer Bros. Co., 270 U. S. 402, 46 S. Ct. 320, 70 L. Ed. 654; Adams v. Tanner, 244 U. S. 590; People's Petroleum Producers v. Sterling, D. C., 60 F. 2d 1041; Hulen v. City of Corsicana, 5 Cir., 65 F. 2d 969; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L. R. A. 1916C, Ann. Cas. 1917C, 1065. The enforcement of section 1 ought to be enjoined, without prejudice to the enactment of such reasonable regulations touching the addition of air or nitrogen as the city may find necessary. The remainder of the ordinance stands."

No regulation has been attempted in this statute. The regulatory features of the Food and Drugs Act are not violated.

Under the fourteenth amendment, nothing is more clearly settled than that it is beyond the power of the state under the guise of protecting the public, arbitrarily to interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. **New State Ice Co. v. Leibmann**, 285 U. S. 262, 278, 76 L. Ed. 747, 754; 52 Sup. Ct. Rep. 371. This decision cites, **Jay Burns Baking Co. v. Bryan** 264 U. S. 504, 513; 68 L. Ed. 813, 826 where a law fixing weight of loaves of broad was held unreasonable and arbitrary and having no relation to preventing short weights. The

words of the Court are very apt in this case where it said (P. 279):

> "The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all of the shoes that are needed."

In the Child Labor case the statute said that you may not ship the product if it is made by the labor of children; in this case the court says—you may not ship a mixture or compound if it be in imitation or semblance of milk, etc. The necessary effect of the law is to prohibit the creation or manufacture of any food out of any milk product which resembles milk, cream, or skimmed milk in any form.

This case involves principles very similar to those before this court in **Adams v. Tanner**, 244 U. S. 590, where a Washington statute prohibited employment agencies. This Court there said (593):

> "But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living. On the contrary, such service is useful, com-

> mendable and in great demand. * * * (594) Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations, But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensive practices: and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

Skillfully directed agitation from 1921 to 1923 brought about the passage of this law and similar ones in a great many states. The great majority of decisions of this court deciding whether certain legislation deprives the citizen if due process relate to state statutes. However with respect to the exercise of the police power it cannot be said that Congress has more leeway or may do things in the exercise of its police power than can be constitutionally done by the State. In the exercise of its constitutional power to regulate commerce Congress has enacted the Food and Drugs Act of June 30, 1906. The primary purpose was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods, securing the purity of foods and to inform purchasers of what they are buying. This statute prohibits the interstate com-

merce in articles of food or drugs which are adulterated or misbranded and then proceeds to carefully define those terms, and point out what constitutes adulteration and misbranding. It was intended to protect the public health from possible injury by adding to food, poisonous and deleterious substances, and to protect from injurious deceits. **U. S. v. Lexington Mills** 232 U. S. 399, 58 L. Ed. 658; 34 Sup. Ct. 337. In the Food & Drugs Act a special provision was made with respect to mixtures or compounds. Chapter 1, Sec. 10 provides:

> "An article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases;
>
> "Mixtures or compounds under distinctive names. —First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.
>
> "Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale. The term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring and flavoring ingredients used for the purpose of coloring and flavoring only. * * *".

This Court in **McDermott v. Wis.** 228 U. S. 115, 129 said:

> "The article of food or drugs, the shipment or delivery for shipment in interstate commerce of which is prohibited and punished is such as is **adulterated or misbranded within** the meaning of the act. What it is to adulterate or misbrand food or drugs within the meaning of the act requires a consideration of its other provisions, wherein such adulteration or misbranding is defined."
>
> (Emphasis ours)

The filled milk statute by its terms relates to compounds of fats and milk products. It is a compound which is neither adulterated nor misbranded under the main provisions of the Food and Drugs Act. It takes out of the general law as to mixtures and compounds, all mixtures or compounds of fats, other than milk fats, and any form of milk—if, the resulting product is in imitation or semblance of any form of milk. It prohibits its shipment. There has been nothing done to cause an imitation.

In **Baltimore Butterine Co. v. Talmadge,** 32 Fed. (2) 904, 909 the court said:

> "Is it not true that 'imitation' indicates something intentional rather than incidental? It imports more than mere resemblance or similitude. If such be true, can any one conceive that the manufacturer of this product was intending to produce an imitation when it was so named and described as to make that impossible."

The comment of Judge Barrett in the above case

with respect to butter applies very forcibly with respect to the apparent intention of Congress in the Filled Milk Law to make unlawful any substitute for milk. He said:

> "Furthermore there is no requirement of the law that a person must use either creamery butter or go without any substitute therefor, provided the substitute was not sold so misbranded as to deceive or so adulterated as to injure. The purpose of this law, it must be remembered, is not to protect other industries, even though they be so important as the dairy industry, but is to protect the consumer from deception or injury. If this be not the correct view, the state is committed to the use of creamery butter for all time for all the purposes now used, and cannot use any substitute therefor derived from other sources, even though more economical, more palatable and more popular."

> "Fraud is never presumed, but must be established by evidence. Of the correctness of his proposition, or its application to the case, there should be no question * * * Fraud is not to be lightly imputed. While certain circumstances will give an inference of fraud, yet the law never presumes it."

Jones v. Simpson, 116 U. S. 609, 615; 29 L. Ed. 742; 6 Sup. Ct. 538
Griffiths v. Commissioner, 50 Fed. (2) 782
Wharton v. Aetna Life Ins. Co., 48 Fed. (2) 37
Tucker v. Traylor Eng. & Mfg. Co., 48 Fed. (2) 783
Superior Oil Corp. v. Mallock, 47 Fed. (2) 993
Pac. Mutual Life Ins. Co. v. Cunningham, 54 Fed. (2) 927
Pardee v. Houcott, 32 Fed. (2) 81, 86

Maryland Casualty Co. v. Palmetto, 40 Fed. (2) 374; Cert. denied 280 U. S. 581
Baer v. Sec. Tr. Co., 32 Fed. (2) 147, 149; Cert. denied 280 U. S. 588
National Bank v. U. S., 34 Fed. (2) 203

In the history of Congressional legislation there is but one instance known to counsel where there has been an attempt to accomplish what has been done by the Filled Milk Law. That is the Oleomargarine legislation. Under the taxing power Congress has levied a tax which was so exorbitant that it was intended to prohibit all products made in imitation or semblance of butter. However, it did not prohibit, but because it was construed to regulate, it has been upheld. It provided strict regulation as to branding, packages, books and records to be kept, labels, marks, and licenses for manufacture, wholesaling and retailing in addition to stamps on the product itself. This court has upheld this law but more than once with apologies and criticisms. It regulated—but did not absolutely prohibit. Here it is a prohibition and not a regulation.

Similar and prohibitive laws were enacted by many states. In 1887 in **Powell v. Pa.**, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 32 L. Ed. 253, this court upheld a statute of Pennsylvania prohibiting the product. Mr. Justice Field wrote a strong dissenting opinion, which according to the Supreme Court of Wisconsin in **Jelke v. Emery**, 193 Wis. 311, 214 N. W. 369, 372 ten years later became the law in **Schollenberger v. Pa.**, 171 U. S. 1 where this Court said:

"We deny the right of a state to absolutely prohibit the introduction within its borders of an

article of commerce, which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for the purposes of fraud or illegal gains. **The bad article may be prohibited, but not the pure and healthy one.** * * * **The fact that** it may be adulterated does not afford a foundation to absolutely prohibit its introduction into the state. Although the adulterated article may possibly in some cases be injurious to the health of the public, yet that does not furnish a justification for an absolute prohibition. **A law which** does thus prohibit the introduction of an article like oleomargarine within the state is not a law which regulates or restricts the sale of articles deemed injurious to the health of the community, but is one which prevents the introduction of a perfectly healthful commodity merely for the purpose of in that way more easily preventing an adulterated and possibly **injurious article** from being introduced. We do not think this a fair exercise of legislative descretion when applied to the article in question."

(Emphasis ours)

If a State cannot prohibit the shipment of a mixture of fats and milk in interstate commerce surely the same thing may not be done by Congress, under its power to "regulate." In **Jelke v. Emery**, 193 Wis. 311, 214 N. W. at p. 373 it is said:

"The courts now take judicial knowledge that oleomargarine is a healthy wholesome food."

Citing:

Braun & Fitts v. Coyne, 125 Fed. 331

Peo v. Arensberg, 105 N. Y. 123

State v. Hanson, 118 Minn. 85

II

THE STATUTE VIOLATES THE DUE PROCESS OF LAW PROVISIONS OF THE CONSTITUTION, IS A SPECIAL LAW, A LEGISLATIVE JUDGMENT AND DECREE AND AN ARBITRARY EXERTION OF LEGISLATIVE POWER, USURPING THE FUNCTIONS OF THE COURT AND JURY, AND CONTAINING A CONCLUSIVE PRESUMPTION AS TO ADULTERATION, INJURY TO HEALTH AND FRAUD.

The statute provides: "It is declared that filled milk, as herein defined is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public."

This is a legislative judgment, condemnation, and sentence.

Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment, to be heard by testimony or otherwise, and to have the right to controvert by proof any material facts which bear upon the question of right, and if any question of fact or liability is conclusively presumed against him, it is not due process of law.

Zeigler v. S. & A. A. R. Co., 59 Ala. 594
Wilbur v. McAlley, 63 Ala. 436.

No more complete exposition of the restrictions under

the due process clause can be found than that given by this court in **Hurtado v. People of California,** 110 U. S. 516; 535; 4 Sup. Ct. Rep. 111, 28 L. Ed. 232 where the court says:

> "Due process of law in the latter refers to that law of the land, which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. * * * But it is not to be supposed that these legislative powers are absolute and despotic, and that the Amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, **'The general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,'** so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments and acts directly transfering one man's estate to another, **legislative judgments and decrees,** and other similar special partial and arbitrary exertions of power under the forms of legislation.
>
> "Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of

a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. **The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities,** as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."
(Emphasis ours)

This case is cited and approved in the case of **Truax v. Corrigan,** 257 U. S. 312, forbidding injunctions against ex-employees, 42 Sup. Ct. Rep. 124, 66 L. Ed. 254, where it is said:

"The due process clause brought down from Magna Charta was found in the early state constitutions and later in the Fifth Amendment to the Federal Constitution as a limitation upon the executive, legislative, and judicial powers of the Federal Government, while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation. **The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns,** which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." (Emphasis ours)

In **Hovey v. Elliott**, 167 U. S. 409, 417, 17 Sup. Ct. 841, 42 L. Ed. 215, it is said:

> "Can it be doubted that due process of law signifies a right to be heard in one's defense. If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution."

In the most quoted case, **Schlesinger v. Wisconsin**, 270 U. S. 230, 239, 70 L. Ed. 557, 563, 46 Sup. Ct. 260, the law provided that every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor * * * shall be construed to have been made in contemplation of death. The court held that this conclusive presumption was a denial of equal protection of the laws in violation of the Constitution, saying:

> "The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within six years of death were made in anticipation of it and to lay a graduated inheritance tax upon them without regard to the actual intent. The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere prima facie presumption of fact.
>
> "The court below declared that a tax on gifts inter vivos only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the 14th Amendment. The

> legislative action here challeged is no less arbitrary. Gifts inter vivos within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction."

A subsequent statute reduced the time to two years and was also held unconstitutional in **Hall v. White**, 48 Fed. (2) 1060, where the court said:

> "Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property."

This decision was sustained by the Circuit Court of Appeals, 53 Fed. (2) 210.

In **Heiner v. Donnan**, 285 U. S. 312, 327, 76 L. Ed. 772, 52 Sup. Ct. Rep. 358, 780, a statute was under consideration which contained the presumption that all gifts made within two years of death were made in contemplation of death. The court said:

> "This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty, a new and startling doctrine, condemned by its mere statement and distinctly repudiated by this court in the **Schlesinger's Case**, 270 U. S. p. 240, 70 L. Ed. 564, and **Hoeper's Case**, 284 U. S., pp. 217, 248, cases involving similar situations. * * *
>
> (329) "However, whether the latter presumption be treated as a rule of evidence or of substantive

law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to exist in actuality, and the result is the same, unless we are ready to overrule the **Schlesinger Case**, as we are not; for that case dealt with a conclusive presumption and the court held it invalid without regard to the question of its technical characterization. This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the 14th Amendment. For example, **Bailey v. Alabama**, 219 U. S. 219, 238 et seq., **Manley v. Georgia**, 279 U. S. 1, 5, 6. 'It is apparent,' this court said in the **Bailey Case** (p. 239) 'that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.' "

In providing by statute that filled milk is an adulterated article, injurious to public health and a fraud upon the public, Congress has usurped the functions of the Judicial Department. In his work on Constitutional limitations, 8th Ed. page 176, Cooley says:

"The grant of the judicial power to the department created for the purpose of exercising it must be regarded as an exclusive grant covering the whole power subject only to the limitations which the constitution imposes.

(184) "Legislation cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another without trial and judgment in the courts for to do

so would be to exercise a power which belongs to another branch of the government and is forbidden to the legislative. That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of government."

The author cites:

Ervine's Appeal, 16 Pa. St. 256;

Greenough v. Greenough, 11 Pa. St. 489;

Distintellaux v. Fairchild, 15 Pa. St. 18;

Trustees v. Bailey, 10 Fla. 238.

The statute is a penal statute punishing the shipment or delivery for shipment of filled milk, but this punishment is based entirely upon certain conclusive presumptions which make the question of adulteration, healthfulness and fraud res adjudicata and deprive a defendant of his right to offer proof with respect thereto.

In **Killbourn v. Thompson,** 103 U. S. 168 at p. 182, 26 L. Ed. 377, it is said:

"No general power of inflicting punishment by the Congress of the United States is found in that instrument (the Constitution). It contains a provision that no person shall be deprived of life, liberty or property without due process of law. The strongest implication against punishment by order of the legislative body. It has been repeatedly decided by this court and by others of the highest authority that this means a trial in which

the rights of the party shall be decided by a tribunal appointed by law which tribunal is to be governed by the rules of law previously established."

The legislative department has no power under the Constitution to conclusively presume anything. The case of **Chicago, Milwaukee & St. Paul R. R. v. Minnesota,** 134 U. S. 418, involving the rights of the Railroad Commission to fix rates very clearly points this out. There the power of the commission was not simply advisory nor merely prima facie as to what rates were equal and reasonable but was final and conclusive and the law did not contemplate or allow any issue or inquiry to be made as to whether the rates were in fact equal and reasonable, leaving no facts to be traversed except the violation of the law in not complying with the recommendations of the Commission. This Court held that such a statute conflicted with the Constitution of the United States in that it deprived the Railroad Company of its right to a judicial investigation by a due process of law under the forms and with the machinery provided for the judicial investigation of the truth of a matter in controversy and substituted therefor the absolute finality of the action of the Railroad Commission.

The court said: (458)

"The question of the reasonableness of a rate of charge for transportation by a railroad company involving as it does the element of reasonableness both as regards the company and as regards the public is eminently a question for judicial investigation requiring due process of law for its determination. Neither the legislature nor such com-

mission acting under the authority of the legislature can establish arbitrarily and without regard to justice the rates for such transportation."

So in the case at hand the legislature has no authority to establish that a combination of two healthful, wholesome, widely used food products is an adulterated article, deleterious to health and a fraud upon the public.

What possible relation can the fact that when a harmless fat is combined with a milk product and the resulting product resembles any milk product have to do with adulteration, healthfulness or fraud? Yet the statute declares that such a product is an adulterated article of food, is injurious to the public, and its sale is a fraud on the public.

The indictment charges the shipment of a certain adulterated article of food, injurious to the public health, to wit Milnut, which was a product of condensed skimmed milk blended with coconut oil the resulting product being in imitation of and semblance of milk, cream, skimmed milk, etc.

A combination of skimmed milk and coconut oil is not an adulterated article under the food and drugs act of June 30, 1906.

Picture the position of defendant being put to trial on this indictment on a plea of not guilty. The government need only prove that it is a compound of skimmed milk and coconut oil as shown on the label and the shipment of the product in interstate commerce, and that it resembled milk, cream or skimmed milk, etc.

In defense defendant attempts to prove it is not adulterated under the Food and Drugs Act. The admission of such evidence is denied since the law declares it is an adulterated article of food. Defendant attempts to prove it is not injurious to health. Again the offer is rejected as the statute declares it is injurious to health. The same would be true if the charge were fraud—not, however, charged in this indictment.

The situation would be identical to the one existing in the case of **Bailey v. Alabama,** 219 U. S. 219, 55 L. Ed. 191, 31 S. Ct. 145, where the statute provided in substance that the refusal or failure to perform the service contracted for, or to refund the money obtained, without just cause, should be prima facie evidence of the intent to injure or defraud.

The court said: (236)

"The law of the state did not permit him to testify that he did not intend to injure or defraud. Unless he were fortunate enough to be able to command evidence of circumstances affirmatively showing good faith, he was helpless. **He stood, stripped by the statute of the presumption of innocence, and exposed to conviction for fraud upon evidence only of breach of contract and failure to pay.**

"It is said that we may assume that a fair jury would convict only where the circumstances sufficiently indicated a fraudulent intent. Why should this be assumed in the face of the statute and upon this record? In the present case the jury did convict, although there is an absence of evidence sufficient to establish fraud under the familiar rule that **fraud will not be presumed,**

and the obvious explanation of the verdict is that the trial court, in accordance with the statute, charged the jury that refusal to perform the service, or to repay the money, without just cause, constituted prima facie evidence of the commission of the offense which the statute defined. That is, the jury were told in effect that the evidence, under the statutory rule, was sufficient, and hence they treated it as such.

(239) "So, also, it must not under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.

"But where the conduct or fact, the existence of which is made the basis of the **statutory presumption**, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a **statutory presumption any more than it can be violated by direct enactment.** The power to create presumption is not a means of escape from constitutional restrictions." (Emphasis ours)

In Manley v. Georgia, 279 U. S. 1, 73 L. Ed. 575, 49 Sup. Ct. Rep. 215, the questioned statute was as follows: (p. 4)

"Every insolvency of a bank shall be deemed

fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one year nor longer than ten years; * * *"

The court said:

"A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. Bailey v. Alabama, 219 U. S. 219, 233. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' McFarland v. American Sugar Ref. Co., 241 U. S. 79, 86."

In McFarland v. American Sugar Refining Co., 241 U. S. 79, 60 L. Ed. 899, 36 S. Ct. R. 498, a statute provided: (p. 81)

"Any person engaged in the business of refining sugar within this state who shall systematically pay in Louisiana a less price for sugar than he pays in any other state shall be prima facie presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction thereof shall be subject to a fine of $500 a day for the period during which he is adjudged to have done so; his license to do business in the state is to be revoked, and any foreign corporation is to be ousted from the state and its property sold."

The court said (p. 86):

"The presumption created here has no relation

in experience to general facts. It has no foundation except with tacit reference to the plaintiff. **But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.** If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it, and that therefore the plaintiff should be prima facie presumed guilty **upon proof** that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed." (Emphasis ours)

The statute involved in the most recent Illinois Filled Milk Act contained the declaration that Filled Milk is an adulterated article of food and its sale constitutes a fraud on the public.

In holding such a law unconstitutional the Supreme Court said:

"Under the law before us, the mixture of any oil or fat other than milk fat with any milk, cream or skimmed milk constitutes conclusive evidence that the resultant product is an adulterated food and if sold the sale is a fraud upon the public, and by Section 3 such sale is made a penal offense. Punishment for selling filled milk is thus based entirely upon the conclusive presumption concerning adulteration and fraud. While the legislature may enact statutes which affect milk and milk products, the application of the statute to a specific case is a judicial function.

By denying vendors such as the plaintiff the right to offer proof with respect to adulteration and fraud the statute deprives them of due process of law and of equal protection of the law. **Weaver v. Palmer Bros. Co., supra; Hovey v. Elliott, 167 U. S. 409; Chicago, Milwaukee and St. Paul Railway Co. v. Minnesota, 134 id. 418; Gillespie v. People,** 188 Ill. 176; **Newland v. Marsh,** 19 id. 376. Furthermore, the statute, in declaring conclusively that the mixture of harmless, healthful food products produces an adulterated food and that its sale is a fraud upon the public, invades the province of the jury."

The Court further said:

"Sec. 2 contains a conclusive assumption as to fraud and adulteration. The legislature does not possess the power to declare what shall be conclusive evidence of a fact, as such a declaration would be an invasion of the power of the judiciary. * * * The legislative department lacks power to declare that to be a fact which everyone knows is not a fact."

If there be no limit or curb upon such legislation then the citizen is at the mercy of the Legislature and special laws and legislative convictions will be in order and the life, liberty and property of minorities may be seized and forfeited by majorities. That this is not an extreme thought is illustrated by the expressions of the Wisconsin Supreme Court.

In **Jaynesville v. Carpenter,** 77 Wis. 288, 46 N. W. 128, where a statute was involved which provided:

"It shall be unlawful and presumptively injurious and dangerous to persons and property to drive

piles, build piers, cribs or other structures—in Rock River within the limits of the County of Rock and the doing of any such act shall be enjoined at the suit of any resident or taxpayer without proof that any injury or danger has been or will be caused by reason of such act."

The court said: (46 N. W. P. 131)

"This is the first time that any legislature of any enlightened country ever attempted to create an action without any cause of action, to authorize a complaint to be made to a court when there is nothing to complain of; to compel the courts to enjoin the lawful use and enjoyment of ones own property without proof that any injury or danger has been or will be caused by reason of such act. * * * (132) It prevents the lawful use of his property. It takes it away from him without compensation or due process of law, and denies the defendant 'the equal protection of the law' * * * It takes his property away from him; and leaves him no remedy whatever by which he can regain it or obtain redress. * * Any restriction or interruption of the common and necessary use of property that destroys its value, or strips it of its attributes, or to say that the owner shall not use his property as he pleases, takes it in violation of the constitution. * * *

"The legislature usurped the judicial power of the courts by the enactment of this statute. It adjudicates an act unlawful and presumptively injurious and dangerous, which is not and cannot be made so without a violation of the constitutional rights of the defendant."

(Citing Ervine's Appeal, 16 Pa. St. 256, the court said:)

"It is said in that case: 'That is not legislation

which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more clearly to despotic rule than to any other attribute of government.'

"This statute is discriminating and class legislation in violation of the spirit of our constitution and contrary to the prnciples of civil liberty and natural justice. It gives to a certain class of citizens privileges and advantages which are denied to all others in the state under like circumstances, and subjects one class to losses, damages, suits, or actions from which all others, under like circumstances are exempted. * * * It would be difficult, if not impossible to crowd into so short a statute any more or greater violations of that principle so essential to a free government of 'equal, general and standing laws.'"

* * * "(133) An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority."

In a case where a statute provided that the weights shown by the bill of lading were conclusive evidence that such an amount had been received for shipment, after reviewing decisions of other states the court, in **Missouri, K, and T R. Co. v. Simonson**, 64 Kan. 802, 807, 57 L.R.A. 765, said:

"The theory on which all these cases proceed is that an act of the legislature which undertakes to make a particular fact or matter evidence involving the substantive right of the case conclusive upon the parties, and which precludes inquiry

into the meritorious issues of the controversy, is an invasion of the judicial province and a denial of due process of law. The legislature may regulate the form and the manner of use of the instruments of evidence—the media of proof—but it cannot preclude a party wholly from making his proof. A statute which declares what shall be taken as conclusive evidence of a fact is one which, of course, precludes investigation into the fact, and itself determines the matter in advance of all judicial inquiry. If such statutes can be upheld there is then little use for courts, and small room indeed for the exercise of their functions."

III

THE STATUTE IS INVALID IN THAT THE CLASSIFICATION WHICH IT MAKES IN FORBIDDING THE SHIPMENT IN INTERSTATE COMMERCE OF THE COMPOUND OR MIXTURE OF MILK AND ANIMAL OR VEGETABLE FATS IN THE IMITATION AND SEMBLANCE OF MILK BUT NOT FORBIDDING SUCH TRANSPORTATION OF MIXTURES AND COMPOUNDS OF MILK AND ANIMAL OR VEGETABLE FATS IN IMITATION OR SEMBLANCE OF BUTTER IS ARBITRARY AND UNREASONABLE AND DEPRIVES DEFENDANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

In a case involving the constitutionality of the Lever Act it was said:

"It seems reasonably clear that the 'due process of law' provision of the 5th amendment is broad enough in its scope and purpose to include the

'equal protection of the laws', which no state may deny to any person under the provisions of the 14th amendment.

"Classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis. Arbitrary selection can never be justified by calling it classification. In other words, no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and in like circumstances."

U. S. v. Yount, 267 Fed. 861, citing **Connolly v. Union Sewer Pipe Co.**, 184 U. S. 540; **Giozza v. Tiernan**, 148 U. S. 657, 13 S. Ct. 721.

The equal protection clause requires that the classification be not arbitrary or unreasonable, but based on real and substantial difference having a reasonable relation to the subject of the particular legislation.

Quaker City Cab Co. v. Philadelphia, 277 U. S. 389, 401, 72 L. Ed. 927, 48 Sup .Ct. Rep. 553.

The Supreme Court of the State of Illinois on the 18th of June, 1931, held the filled milk law of the State of Illinois which prohibited the manufacture, possession or sale of filled milk within the State of Illinois to be unconstitutional, as an arbitrary and unreasonable classification, said:

"* * * It is unreasonable to permit cocoanut oil to be freely used as the principal ingredient of oleomargarine by one manufacturer and prohibit its

use in small proportions by another manufacturer of a food product admitted to be equally wholesome and healthful. No showing is made that such a restriction is justified to protect the public health or to prevent fraud. Section 19½ is arbitrary and unreasonable, and is therefore a void enactment."

In the **Connolly case**, 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431, this court was dealing with the Anti-Trust Act of Illinois (Laws 1893 p. 182) condemning trusts or combinations or conspiracies to limit production, prevent competition, and fix prices. Section 9 of the Act provided:

"The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

In holding the classification to be arbitrary the court said:

"We have seen that under the statute all except producers of agricultural commodities and raisers of live stock, who combine their capital, skill, or acts for any of the purposes named in the act, may be punished as criminals, while argiculturists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the state. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a state, and agriculturists and raisers of live stock, are all in the same general class; that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in

like conditions, as the state may legally prescribe."

If persons engaged in the sale or trade of merchandise and commodities and raisers of live stock are in the same general class then surely persons engaged in the manufacture and sale of combinations of milk and fat in the form of oleomargarine and those engaged in the manufacture and sale of the same ingredients in the form of filled milk are in the same class and the latter are entitled to equal protection with the former.

IV

APPELLANT'S BRIEF

APPELLANT HAS SOUGHT TO CONFINE THE APPLICATION OF THE STATUTE TO COMPOUNDS OF "SKIMMED MILK" WHILE, IN FACT, IT RELATES TO COMPOUNDS OF CREAM, MILK, OR SKIMMED MILK IN ANY FORM. SUBSTITUTES FOR EVERY NECESSITY OF LIFE ARE COMMON AND DESIRABLE. VITAMINS ARE SUBJECTS OF CONTROVERSY AND NO STANDARD FOR VITAMINS HAS EVER BEEN ATTEMPTED BY STATUTE. HEBE VS. SHAW IS NOT APPLICABLE TO THE INTERPRETATION OF A FEDERAL LAW AS IT SET A STANDARD FOR STATE NOT FEDERAL STATUTES. THE STATUTE WAS PASSED BY POWERFUL MAJORITIES TO ELIMINATE COMPETITION AND NOT FOR THE PRESERVATION OF THE HEALTH, SAFETY OR COMFORT OF THE PUBLIC:

Appellant's argument is based upon the following propositions:

1. The power of Congress is not limited to the prohibition of the shipment of articles which are noxious in character.

2. Congress has concluded that filled milk is an adulterated article of food, injurious to the public health, and its sale a fraud on the public and that that conclusion is binding upon this court.

   a. Because it is designed as a substitute for milk.

   b. Lack of Vitamin A.

   c. Substitution of cocoanut oil for butter fat makes filled milk identical with evaporated milk in color, consistency and taste.

3. Congress may prohibit the interstate shipment of articles in order to prevent the spread of evils among the states, assuming that filled milk is an evil.

4. That the act does not violate the 5th Amendment, basing this on Hebe v. Shaw, 248 U. S. 297.

5. Filled milk legislation exists in many states.

6. The necessity of such legislation is a debatable question.

7. Since findings of Congress are not without support in fact, the legislative judgment should be sustained.

Appellant seems to have based its argument upon a

misconstruction of the statute. On page 9 of its brief it is said:

> "Filled milk, as defined in the statute and as described in the Committee reports of Congress, is an imitation of condensed or evaporated whole milk made by extracting butter fat from whole milk and substituting therefor a fat such as cocoanut oil."

Appellant seeks to limit the definition to compounds of skimmed milk, while in fact it applies to mixtures with cream, whole milk, and skimmed milk, and evaporated, concentrated, powdered, dried, desiccated, or condensed milk, cream, or skimmed milk, and then only if it resembles some milk product.

In Appellee's product the basic substance is "Skimmed milk," a recognized product, whose shipment or sale is in no way limited. The addition of a wholesome fat is an improvement, not a debasement of the product.

The use of substitutes for articles which are not available because of scarcity, or expense are common everyday experiences. There is scarcely any article used by the human race for which substitutes are not available and desirable.

The excuse for the passage of the Act as shown by the Congressional Committee reports was the lack of Vitamin A in vegetable fats and skimmed milk. Vitamins are so little understood, and the theories of nutritians so constantly changing that no vitamin standard has ever been attempted. For twenty years vitamins, their merits, uses, and sources have been in constant controversy. In

1932 the American Medical Association published a volume called "The Vitamins" being a reprint of the articles submitted by twelve outstanding food authorities. On p. 24 it is said:

> "The functions of vitamin A have been variously stated as growth promoting, infection resisting and antixerophthalmic, although it has been denied by some that this vitamin has any of these functions."

On page 25 the following statement is made:

> "It may be said at the outset that the most familiar form of vitamin A deficiency, xerophthalmia, both of infants and of adults, especially the latter, is extremely rare in the United States. There is good reason to believe that the ordinary food supplies of the major portion of the population of this country furnish enough of this accessory food factor so that there is no tangible evidence of a lack of it."

Again on page 36 the following statement is made:

> "The foods rich in this vitamin, as previously mentioned, are butter, milk, cod liver oil, and vegetables containing green and yellow pigment. That the ordinary American dietary contains foods adequately supplied with this vitamin is attested by the rarity of such diseases in the United States. There is no evidence that the normal person fails to absorb vitamin A or its precursor, carotene."

Each of the State Supreme Courts which have recently considered Filled Milk laws have held that the laws relate in no way to the presence of absence of vitamins.

The fact of similarity of filled milk to other milk products is a natural result. Fats or oils are tasteless and odorless. The taste and odor of all milk products comes from the casein, not from the fat. In every pound of filled milk there is 2½ times the casein that is in whole milk, so that it would be unnatural if it did not taste and smell like milk.

Appellant relies upon the case of Hebe v. Shaw, 248 U. S. 297 to sustain this statute. The statute in that case was not a filled milk law. It was not a prohibitory law. It established a standard for "Condensed milk". Unlike this law it did not recognize skimmed milk or evaporated skimmed milk, and construed filled milk as "condensed milk" deficient in the required amount of fat. This was well and clearly stated by the Michigan Supreme Court in Carolene v. Thompson (supra) where speaking of the Hebe case it said:

> "Its resemblance to this case is quite superficial. It involved a similar milk product, skim milk and oil, but the Court declared the oil was of no consequence. It construed the Ohio statute as prohibiting the sale of condensed skim milk in any form, not merely when mixed with oil. It held the act valid, as against the Federal Constitution, on the ground that it established a standard of nutritive elements for milk and it was designed to save the public from "Fraudulent substitution of an inferior product that would be hard to detect." The Court did not indicate the possibilities of fraud nor the possible ineffectiveness of regulation to conserve the public good.
>
> Its distinctions from this case are quite apparent. The Ohio act, as construed, established a standard of milk for sale, wholly outlawed an inferior

grade of milk but only in manufactured or processed form—condensed skim milk. Our statute is much broader. It established no standard of milk, does not purport to outlaw any kind of milk because it is inferior, is not concerned with whether the product is in manufactured or natural form, but prohibits the sale of any kind of milk, whole or skimmed, and of any milk products whether in natural, manufactured or processed form, and although their sale is otherwise permitted by law, on the single contingency of adding foreign oils also legally salable. With such fundamental differences in the acts, the Hebe case should not be accepted as controlling because of superficial likenesses.

The acceptance of the ruling in the Hebe case, its application to our State Constitution and its extension to the statute at bar, would establish a principle with broad effect upon the rights of citizens, producers, tradesmen and consumers. Regardless of the actual purpose of the instant law, the principle would mean that the legislature may impair, as well as conserve, the market for dairy products, prohibit the manufacture and sale of a wholesome article therefrom and prevent citizens with limited incomes from purchasing a food product they want if, perchance the Court can imagine that the legislature saw a reality or mirage of fraud in the far distance. Extended to other trades, it would enable the legislature to ban many common articles of commerce, such, for example, as syrup not all maple, shoes not all leather, clothes or comfortables with shoddy in them (Weaver v. Palmer, supra) and the like."

The dissenting opinion in the Hebe case is more nearly in harmony with recent judicial thought than the majority

opinion and certainly is the more logical and better reasoned, and appellee begs this court to again read that dissent. That case considered whether a state statute violated the 14th amendment of the United States Constitution and was upheld as proper state legislation but can be no authority for sustaining a Federal statute as a proper exercise by Congress of its power under the Commerce Clause.

The law was passed ostensibly to protect the public health and to prevent fraud and according to the decisions of this Court and the various state courts that have dealt with this particular product it must have some relation to that object.

The appellant has attached to its brief Appendix A being extracts from the congressional committee reports prior to the time of the passage of the act. A brief examination of those reports will show that the act does not, and Congress has made no attempt to, protect health or to protect from fraud but merely sought to eliminate all competition with evaporated milk products by a prohibition of the product and not a regulation of it.

The report states, page 31:

> "The bill proposes to prohibit the manufacture of this compound in the District of Columbia, the Territories and insular possessions."

Every state supreme court that has in recent years passed upon state prohibitory laws have held them void.

The report continues:

"And to prohibit its shipment in interstate commerce."

Notwithstanding the act applies to milk and cream as well as skimmed milk, the report deals entirely with skim milk. It states, page 32:

"The compound can be made more cheaply than the regular article."

Page 33:

"In 1920 nearly eight million pounds of cocoanut fat were used in the manufacture of Filled Milk taking the place of that many pounds of butter fat, injuring the market of the American farmers and bringing his product in competition with a decidedly inferior product. * * * it is put up in the same sized cans as regular condensed milk."

Page 35:

"No reason is perceived by the committee why an exact imitation of or substitute for this article should be permitted to be sold to the public which does not meet these requirements."

(The standard of evaporated milk.)

Page 37:

"The committee is of the opinion that the traffic of the article should be stopped now * * * before serious damage is done to the dairy industry."

Page 38:

"Instead of vast quantities of whole milk being

condensed, the butter fat must be extracted and turned into a competitive oversupply of butter."

Page 39:

"If Congress or the several states does not do something to stop this competition * * *."

Page 43:

"While the proposed bill will not prohibit the manufacture and sale of the compound within the limits of a state, the committee is of opinion that a law prohibiting interstate shipment will suppress it. * * * Because a sufficient milk supply cannot be found in many states which would warrant engaging in the enterprise."

Page 48:

"What is filled milk? It is a compound of skimmed milk and cocoanut oil."

(No mention is made of the fact that under the statute it is also whole milk and cream combined with any fat other than milk fat.)

Page 49:

"The compound can be manufactured for less than half of the cost of evaporated milk." A table shows the production of 296,741,658 pounds from 1916 to 1921.

Page 51:

"Our chief source of the vitamins is milk and the vitamins are found almost wholly in the butter fat of milk."

(This court knows that as a matter of fact all of the vitamins B, C and G of milk remain in the skimmed milk and that as to Vitamin A milk is of comparatively low Vitamin A content.)

Page 52:

"Milk is the one chief food of the nation and no adulteration of it or substitution for it should be permitted."

Page 53:

"There are cases in which whole cows milk is not acceptable to an infant and where it has been found that compounds of skimmed milk, cocoanut oil, cod-liver oil (rich in vitamins) and other ingredients may be more acceptable."

Page 54:

"There is no claim that the compound in and of itself is unwholesome. * * * the claim that an additional market is found by the manufacture of this compound for the farmers skimmed milk is not well founded. Even if this claim could be substantiated it would in the judgment of the committee be no justification for its manufacture." (Could it be any ground for its prohibition and suppression?) "* * * Moreover opponents of the measure were unable to demonstrate to the committee any uses of the compounds which were different from or additional to the uses of whole milk." (Is this a ground for suppression?)

Page 55:

"The value of 100 pounds of skim milk was shown

to be from 35 to 50 cents while the value of 4 pounds of cocoanut oil would be approximately 48 cents and the value of four pounds of butter fat would be approximately $1.72 * * * There is no purpose for which Filled Milk is used where evaporated or condensed milk will not do as well or better."

Page 57:

"It is reasonable to assume that in the absence of state legislation and campaigns or education conducted in respect to the compound its sale would now run into hundreds of millions of pounds per year."

Page 58:

"* * * We cannot afford to let a few manufacturers in this country for an additional profit to them strike a blow which will do irreparable injury to out entire dairy industry."

Attention is invited to the minority view of the Committee on Agriculture as set out on pages 44 and 45 of Appellant's brief. If as stated there the proponents of the law agreed that a product "composed of skimmed milk and vegetable oil is not unwholesome, deleterious or injurious to health, but a wholesome and nutritious food," there could have been no debatable question then, neither is there now, that there is anything harmful about the product, and that it cannot be, "an agency to promote immorality, dishonesty, or the spread of any evil or harm." The majority report (P. 54) admits: "There is no claim that the compound in and of itself is unwholesome."

Mention is made in appellant's brief (p. 10) of the recent decision of the Circuit Court of Appeals for the 7th Circuit, Carolene v. Evaporated Milk Assn. This case brought by Appellee herein, sought to enjoin the Evaporated Milk Association from continuing a conspiracy to restrain its interstate trade in Carolene and Milnut, alleging that this organization was a conspiracy under the anti-trust laws of the United States, restraining appellee's trade by the circulation of false propaganda, causing the passage of prohibitory laws against appellee's products, and hiring lawyers and witnesses to oppose appellee in cases to which neither the Association nor its members were parties. The Association admitted this but contended appellee had no standing in a court of equity because of the law here involved. The court upheld this view, and refused to deal with the conspiracy charge, but without brief, argument or evidence wrote a lengthy opinion sustaining the constitutionality of the Federal Act. If that case shows anything it shows the reason for the existence of this act to be what was described in Adams v. Tanner as "skillfully directed agitation" by competitors.

Appendix B of appellant's brief purports to give the status of filled milk legislation in the various states. It neglects, however, to state that the enforcement of the statute of Alabama has been enjoined at the instance of appellee which is also true with the statute of the states of Iowa, Missouri, Virginia and West Virginia. It also neglects to state that the statute of Pennsylvania which was upheld in the case of Carolene Products Company v. Harter was a statute regulating the size of cans and labels to be used and not a statute prohibiting the manufacture or sale of a skimmed milk compound. It further neglects to state that the case of State v. Emery,

178 Wis. 147, has been overruled in every point by a more recent decision of that case Jelke v. Emery 193 Wis.

CONCLUSION

Appellee, therefore, submits that the judgment of the District Court, sustaining the demurrer should be sustained.

Disregarding the reports of Congressional Committees and facts in State decisions, this law on its face shows it to be an usurpation of State authority by Congress, under the guise of a regulation of Commerce; that it is a prohibition and not a regulation; that the fact that a food resembles a milk product is not proper reason for its prohibition; and that the statute denies a defendant indicted under its terms the right to present evidence of adulteration, healthfulness or fraud and usurps the power of the court and the jury.

Respectfully submitted,
CAROLENE PRODUCTS COMPANY,
By George N. Murdock, Counsel.

In The
CIRCUIT COURT OF SANGAMON COUNTY,
ILLINOIS

Carolene Products Company, Plaintiff,
v.
Walter W. McLaughlin, Director, etc., Defendant.

Chan. No. 67032.
Unpublished.

This is a complaint for injunction to restrain defendant from enforcing against plaintiff an act of July 10, 1935, commonly known as the "Filled Milk" statute on the ground that said Statute is unconstitutional and void because it deprives plaintiff of its property without due process of law and deprives it of the equal protection of the law and because it is special legislation and discriminatory.

The statute in question is as follows:

"19c. 'Filled milk' defined). S. 19a. The term 'filled milk' means any milk, cream or skimmed milk, whether or not condensed, evaporated, concentrated or desiccated, or any of the fluid derivatives of them, to which has been added any fat or oil other than milk fat. This definition shall not include any milk from which no part of the milk fat has been extracted, whether or not condensed, evaporated, concentrated or desiccated, to which has been added any substance rich in vitamins, nor any distinctive proprietary food compound not readily mistaken for milk or cream or for evaporated, condensed, concentrated or desiccated milk or cream, provided such compound (1) is pre-

pared and designed for the feeding of infants or young children and customarily used on the order of a physician; (2) is packed in individual cans containing not more than sixteen and one-half (16½) ounces of the article, bearing a label in bold type that the contents are to be used only for said purpose.

"19d. (Sale of filled milk declared fraud.) S. 19b. 'Filled milk' as herein defined, is an adulterated food and its sale constitutes a fraud upon the public.

"19e. Manufacture and sale of filled milk prohibited.) S. 19c. It shall be unlawful for any person, by himself, his servant or agent, or as the servant or agent of another, to manufacture for sale within this State or sell or exchange, or have in his possession with intent to sell or exchange, any 'filled milk', as defined in this Act."

These sections repealed and replaced **Section 19½ of Chapter 56½, Smith-Hurd's R. S. 1929,** which was declared unconstitutional by our Supreme Court in **People v. Carolene Products Company,** 345 Ill. 166. That Statute was as follows:

"No person shall manufacture, sell or exchange, or have in possession with intent to sell or exchange, any milk, cream, skim milk, buttermilk, condensed or evaporated milk, powdered milk condensed skim milk or any of the fluid derivatives of, any of them to which has been added any fat or oil other than milk fat, either under the name of said products or articles or the derivatives thereof or under any fictitious or trade name whatsoever."

The issue here is arrived at by allegations and denials of material facts which are not here recited. The parties hereto for whose benefit this memorandum is prepared are perfectly familiar with the pleadings.

Plaintiff's evidence showed that the product was manufactured by taking sweet milk from which substantially all the butter fat had been removed by the ordinary process of separation, evaporating it to a little more than half its volume, and adding thereto not less than 6% fresh, sweet, refined coconut oil. It was then packed in air-tight cans, sterilized and packed in cases. The plaintiff sells the product throughout the State through jobbers. The only advertising done by plaintiff consisted of some cardboard window sings, a recipe book, an advertising mat prepared for use of retailers in advertising; said mat showing an exact reproduction of the can and front part of the label with the words:

> "Science's contribution to the art of good living—MILNUT. So rich it whips. Costs no more and gives better results than ordinary evaporated milk. A blend —evaporated;"

and a circular notifying dealers that the product was to be sold only under the trade name and not as evaporated milk. The labels, introduced in evidence, show in two places that the product is a compound, the ingredients, refined nut oils and evaporated skimmed milk and shows the proportions of each; it shows the intended uses "for coffee, baking and other culinary purposes" and a statement that it is "not to be sold for evaporated milk".

It was shown that coconut oil is one of the leading food fats in actual use in the United States, the use being

approximately four pounds per capita, and is the principal constituent of oleomargarine, which product alone uses over 140 million pounds annually, that it is extensively used in shortening, candies, wafers, crackers and as a covering for salted nuts and crackers, the reason for its superiority being that it does not get rancid as quickly as butter fat, hence the product remains sweet after opening, longer than ordinary evaporated milk. It was shown that the skimmed milk content contains all of the proteins, carbohydrates and minerals of whole milk to an extent of about 2¼ times whole milk and all of the vitamins found in evaporated milk except vitamin A, and that as a producer of energy coconut oil was equivalent in every way to butter fat. It was shown that the valuable vitamins B and G which are water soluble were retained in a similarly increased proportion. It was shown that vitamins B and G are the vitamins which prevent beri-beri and pellagra, and that their uses are regulation of appetite and digestion, prevent paralysis, heart trouble, ailments of the digestive system, etc. It was shown that vitamin A is one of the most common vitamins and is readily supplied by other foods, one egg yolk containing as much of the vitamin as a quart of milk, a half teaspoon of spinach as much as a cup of milk, while one tablespoon of cod liver oil contains as much as eleven cups of milk. It was further shown that vitamin A is entirely lacking in many of the best known and commonly used foods, such as white bread, sugar, molasses, raisins and corn starch. Well qualified experts testified to the uses and wholesomeness of both coconut oil and skim milk and that was nothing in either of them or a combination of them that was in any way deleterious to health.

Defendant introduced an expert who testified as to

a test designed to show the presence of vitamin A in Milnut, Carolene and evaporated milk. The test showed that there was ten times as much vitamin A in evaporated milk as in the compounds. Plaintiff's expert testified to an even smaller amount. It was testified, however, that if an amount of cod liver oil one-half as large as a pin head had been added to the daily ration of each rat fed on Milnut the vitamin A content would have equaled that of the evaporated milk ration. It was shown by medical testimony that evaporated milk contained no vitamin C and that for infant feeding it was necessary to supplement evaporated milk or whole milk with foods rich in vitamin C and that infant foods made of vegetable oils and milk from which some or all of the fat had been removed were common on the market and that even plaintiff's product if properly supplemented might be satisfactory for such feeding.

Defendant introduced testimony of witnesses who purchased Milnut from retail grocers in Chicago and that when they asked for the cheapest evaporated milk they were sometimes handed Milnut, sometimes told that the grocer had Milnut, and sometimes the witnesses had to inquire about Milnut before producing it. A summary of the evidence shows that there were ample evidence that the products are nutritious, healthful, wholesome foods and in no way deleterious to health. The labels speak the truth. There is no evidence that any person was in any way deceived, defrauded or injured by its purchase or use.

By the evidence above quoted it seems clear to the Court that it should regard the product of plaintiff as was regarded by the Supreme Court in the **Carolene Products Co. case, supra,** under the stipulation, not harmful or

deleterious to health in any way and its possession in no way dangerous to the public, and I may further say its sale in no way dangerous to the public. In that regard the case at bar is parallel to the Carolene case referred to. It is obvious, therefore, that to maintain the Statute it must be upon the theory of that which defendant claims was not adjudicated in the above case, namely, the question of imitation or deceit involved, if any.

The Court in that case had submitted to it practically all of the authorities relied upon by defendant here, and each of those cases was distinguished as shown by the opinion referred to. After the analysis of those cases and notwithstanding them, the Court concludes its opinion as follows:

> "Under the facts admitted in this case the legislature has exceeded its constitutional power in enacting the law in question. It is admitted that Carolene is not poisonous or explosive and that it does not injuriously affect the health, safety or welfare of the people. Coconut oil is admitted to be a healthful substance and is the principal ingredient of oleomargarine. It is unreasonable to permit coconut oil to be freely used as the principal ingredient of oleomargarnie by one manufacturer and prohibit its use in smaller proportions by another manufacturer of a food product admitted to be equally wholesome and healthful. 'No showing is made that such a restriction is justified to protect the public health or to prevent fraud. Section 19½ is arbitrary and unreasonable, and is therefore a void enactment."

We shall now consider those questions which defend-

ant says were not adjudicated by the Supreme Court in the Carolene case, supra.

There is no evidence in the record that anyone has been deceived into the belief that this product was condensed milk except in a few isolated cases, and the officers of plaintiff made diligent efforts to prevent that thing. The wrappers on the cans expose what the product is and there is nothing about those wrappers tending to deceive the trade that the contents of the can are milk. There is nothing about the product and its sale and distribution which make the product "apt" to deceive or msilead. It would be an unreasonable expansion of the admittedly broad police powers of the State to say that this product calls for an exercise of those powers in order to suppress the sale and distribution thereof on account of imitation, deception and fraud.

This act is subject to another serious objection. It would take from me, for example, the power to hear and determine as I have attempted to do above, whether this product is adulterated or whether its manufacture and sale is a fraud. It has attempted to establish a conclusive presumption that it is adulterated and that it is a fraud. In People v. Rose, 207 Ill. 352, the Court said:

> "It is not, however, within the legislative power to declare what shall be conclusive evidence as that would be invasion of the power of the judiciary. (People v. Falk, 310 Ill. 282; People v. Love, 310 Ill. 558."

This Statute is a penal Statute, punishing the manufacture or sale of "filled milk," but this punishment is

based entirely upon the conclusive presumption which makes the question of adulteration and fraud res adjudicata and deprives the plaintiff of its right to offer proof with respect thereto before a Court under the process of law. This the Legislature has no power to do. (Chicago, Milwaukee & St. Paul R. R. v. Minnesota, 134 U. S. 418; Newland v. Marsh, 19 Ill. 376; Hovey v. Elliott, 167 U. S. 407; Gillespie v. People, 188 Ill. 176; State v. Jullow, 119 Mo. 163.)

This Act not only states a conclusive presumption intended to be binding upon Courts and everybody else, but it contravenes another act of the legislature which defines adulteration, and it appears from the evidence that plaintiff's compound is not adulterated thereunder.

Other questions are raised on this record and argued at length and ably, but it seems to me that a serious consideration of the above and foregoing must inevitably lead to the conclusion that the Act under examination is without the power of the Legislature under the Constitution, and is therefore void.

It follows that I am of the opinion that the equities in this case are with the plaintiff and that the temporary injunction heretofore issued should be and it is hereby made permanent.

Lawrence E. Stone,
Judge.

pp. 4, 5, 7.

SUPREME COURT OF THE UNITED STATES.

No. 640.—October Term, 1937.

The United States of America, Appellant, vs. Carolene Products Company.	Appeal from the District Court of the United States for the Southern District of Illinois.

[April 25, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether the "Filled Milk Act" of Congress of March 4, 1923 (c. 262, 42 Stat. 1486, 21 U. S. C. §§ 61-63),[1] which prohibits the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream, transcends the power of Congress to regulate interstate commerce or infringes the Fifth Amendment.

Appellee was indicted in the district court for southern Illinois for violation of the Act by the shipment in interstate commerce of certain packages of "Milnut", a compound of condensed skimmed milk and coconut oil made in imitation or semblance of condensed milk or cream. The indictment states, in the words of the statute, that Milnut "is an adulterated article of food, injurious to the public health," and that it is not a prepared food product of the type excepted from the prohibition of the Act. The trial court sustained a demurrer to the indictment on the authority of an earlier case in the same court, *United States* v. *Carolene Products*

[1] The relevant portions of the statute are as follows:

"Section 61. . . . (c) The term 'filled milk' means any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated. . . .

"Section 62. . . . It is hereby declared that filled milk, as herein defined, is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public. It shall be unlawful for any person to . . . ship or deliver for shipment in interstate or foreign commerce, any filled milk."

Section 63 imposes as penalties for violations "a fine of not more than $1,000 or imprisonment of not more than one year, or both . . ."

Co., 7 Fed. Supp. 500. The case was brought here on appeal under the Criminal Appeals Act of March 2, 1937, 34 Stat. 1246, 18 U. S. C. § 682. The Court of Appeals for the Seventh Circuit has meanwhile, in another case, upheld the Filled Milk Act as an appropriate exercise of the commerce power in *Carolene Products Co.* v. *Evaporated Milk Ass'n*, 93 F. (2d) 202.

Appellee assails the statute as beyond the power of Congress over interstate commerce, and hence an invasion of a field of action said to be reserved to the states by the Tenth Amendment. Appellee also complains that the statute denies to it equal protection of the laws and, in violation of the Fifth Amendment, deprives it of its property without due process of law, particularly in that the statute purports to make binding and conclusive upon appellee the legislative declaration that appellee's product "is an adulterated article of food injurious to the public health and its sale constitutes a fraud on the public."

First. The power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed", *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, and extends to the prohibition of shipments in such commerce. *Reid* v. *Colorado*, 187 U. S. 137; *Lottery Case*, 188 U. S. 321; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366; *Hope* v. *United States*, 227 U. S. 308; *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311; *United States* v. *Hill*, 248 U. S. 420; *McCormick & Co., Inc.* v. *Brown*, 286 U. S. 131. The power "is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed by the Constitution." *Gibbons* v. *Ogden, supra*, 196. Hence Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare, *Reid* v. *Colorado, supra; Lottery Case, supra; Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *Hope* v. *United States, supra*, or which contravene the policy of the state of their destination. *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334. Such regulation is not a forbidden invasion of state power either because its motive or its consequence is to restrict the use of articles of commerce within the states of destination, and is not prohibited unless by the due process clause of the Fifth Amendment. And it is no objection to the exertion of the power

to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. *Seven Cases* v. *United States*, 239 U. S. 510, 514; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 156. The prohibition of the shipment of filled milk in interstate commerce is a permissible regulation of commerce, subject only to the restrictions of the Fifth Amendment.

Second. The prohibition of shipment of appellee's product in interstate commerce does not infringe the Fifth Amendment. Twenty years ago this Court, in *Hebe Co.* v. *Shaw*, 248 U. S. 297, held that a state law which forbids the manufacture and sale of a product assumed to be wholesome and nutritive, made of condensed skimmed milk, compounded with coconut oil, is not forbidden by the Fourteenth Amendment. The power of the legislature to secure a minimum of particular nutritive elements in a widely used article of food and to protect the public from fraudulent substitutions, was not doubted; and the Court thought that there was ample scope for the legislative judgment that prohibition of the offending article was an appropriate means of preventing injury to the public.

We see no persuasive reason for departing from that ruling here, where the Fifth Amendment is concerned; and since none is suggested, we might rest decision wholly on the presumption of constitutionality. But affirmative evidence also sustains the statute. In twenty years evidence has steadily accumulated of the danger to the public health from the general consumption of foods which have been stripped of elements essential to the maintenance of health. The Filled Milk Act was adopted by Congress after committee hearings, in the course of which eminent scientists and health experts testified. An extensive investigation was made of the commerce in milk compounds in which vegetable oils have been substituted for natural milk fat, and of the effect upon the public health of the use of such compounds as a food substitute for milk. The conclusions drawn from evidence presented at the hearings were embodied in reports of the House Committee on Agriculture, H. R. No. 365, 67th Cong., 1st Sess., and the Senate Committee on Agriculture and Forestry, Sen. Rep. No. 987, 67th Cong., 4th Sess. Both committees concluded, as the statute itself declares, that the use of filled milk as a substitute

for pure milk is generally injurious to health and facilitates fraud on the public.[2]

There is nothing in the Constitution which compels a legislature, either national or state, to ignore such evidence, nor need it disregard the other evidence which amply supports the conclusions of the Congressional committees that the danger is greatly enhanced where an inferior product, like appellee's, is indistinguishable from a valuable food of almost universal use, thus making fraudulent distribution easy and protection of the consumer difficult.[3]

Here the prohibition of the statute is inoperative unless the product is "in imitation or semblance of milk, cream, or skimmed

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[2] The reports may be summarized as follows: There is an extensive commerce in milk compounds made of condensed milk from which the butter fat has been extracted and an equivalent amount of vegetable oil, usually coconut oil, substituted. These compounds resemble milk in taste and appearance and are distributed in packages resembling those in which pure condensed milk is distributed. By reason of the extraction of the natural milk fat the compounded product can be manufactured and sold at a lower cost than pure milk. Butter fat, which constitutes an important part of the food value of pure milk, is rich in vitamins, food elements which are essential to proper nutrition and are wanting in vegetable oils. The use of filled milk as a dietary substitute for pure milk results, especially in the case of children, in undernourishment, and induces diseases which attend malnutrition. Despite compliance with the branding and labeling requirements of the Pure Food and Drugs Act, there is widespread use of filled milk as a food substitute for pure milk. This is aided by their identical taste and appearance, by the similarity of the containers in which they are sold, by the practice of dealers in offering the inferior product to customers as being as good as or better than pure condensed milk sold at a higher price, by customers' ignorance of the respective food values of the two products, and in many sections of the country by their inability to read the labels placed on the containers. Large amounts of filled milk, much of it shipped and sold in bulk, are purchased by hotels and boarding houses, and by manufacturers of food products, such as ice cream, to whose customers labeling restrictions afford no protection.

[3] There is now an extensive literature indicating wide recognition by scientists and dietitians of the great importance to the public health of butter fat and whole milk as the prime source of vitamins, which are essential growth producing and disease preventing elements in the diet. See Dr. Henry C. Sherman, *The Meaning of Vitamin A*, in *Science*, Dec. 21, 1928, p. 619; Dr. E. V. McCollum et al., *The Newer Knowledge of Nutrition* (1929 ed.), pp. 134, 170, 176, 177; Dr. A. S. Root, *Food Vitamins* (N. Car. State Board of Health, May 1931), p. 2; Dr. Henry C. Sherman, *Chemistry of Food and Nutrition* (1932), p. 367, Dr. Mary S. Rose, *The Foundations of Nutrition* (1933), p. 237.

When the Filled Milk Act was passed, eleven states had rigidly controlled the exploitation of filled milk, or forbidden it altogether. H. R. 365, 67th Cong., 1st Sess. Some thirty-five states have now adopted laws which in terms, or by their operation, prohibit the sale of filled milk. Ala. Agri. Code, 1927, § 51, Art. 8; Ariz. Rev. Code, [illegible] Pope's Ark. Dig. 1937, § 3103; Deering's Cal. Code, 1933 Supp., Tit. 149, Act 1943, p. 1302; Conn. Gen. Stat., 1930, § 2487, c. 135; Del. Rev. Code, 1935, § 649; Fla. Comp. Gen. Laws, 1927, §§ 3216, 7676; Ga. Code, 1933, § 42-511; Idaho Code, 1932, tit. 36, §§ 502-504; Jones Ill. Stat. Ann., [illegible] Supp., § 53.020 (1), (2), (3); Burns Ind. Stat., [illegible] Iowa Code, 1935, § 3062; Kan. Gen. Stat., 1935, c. 65, § 707; Md. Ann. Code, § 281; Mass. Ann. Laws, [illegible] § 17-A, c. 94; 1933, § 35-1203; Art. 27, 1937 1933, 1936 Supp., § 9434;

milk, whether or not condensed". Whether in such circumstances the public would be adequately protected by the prohibition of false labels and false branding imposed by the Pure Food and Drugs Act, or whether it was necessary to go farther and prohibit a substitute food product thought to be injurious to health if used as a substitute when the two are not distinguishable, was a matter for the legislative judgment and not that of courts. *Hebe Co.* v. *Shaw, supra; South Carolina* v. *Barnwell Bros. Inc.*, No. 161, this term, decided February 14, 1938. It was upon this ground that the prohibition of the sale of oleomargarine made in imitation of butter was held not to infringe the Fourteenth Amendment in *Powell* v. *Pennsylvania*, 127 U. S. 678; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238. Compare *McCray* v. *United States*, 195 U. S. 27, 63; *Purity Extract and Tonic Co.* v. *Lynch*, 226 U. S. 192.

Appellee raises no valid objection to the present statute by arguing that its prohibition has not been extended to oleomargarine or other butter substitutes in which vegetable fats or oils are substituted for butter fat. The Fifth Amendment has no equal protection clause, and even that of the Fourteenth, applicable only to the states, does not compel their legislatures to prohibit all like evils, or none. A legislature may hit at an abuse which it has found, even though it has failed to strike at another. *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160; *Miller* v. *Wilson*, 236 U. S. 373, 384; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 556; *Farmers and Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 649, 661.

Third. We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of

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Mich. Comp. Laws, 1929, § 5358; Mason's Minn. Stat., 1927, § 3926; Mo. Rev. Stat., 1929, §§ 12408-12413; Mont. Rev. Code, Anderson and McFarland, 1935, c. 240, § 2620.39; Neb. Comp. Stat., 1929, § 81-1022; N. H. Pub. L. 1926, v. 1, c. 163, § 37, p. 619; N. J. Comp. Stat., 1911-1924, § [illegible], p. 1400; Cahill's N. Y. Cons. Laws, 1930, § 60, c. 1; N. D. Comp. Laws, 1913-1925, c. 38, § 2855(a) 1; Page's Ohio Gen. Code, § 12725; Purdon's Penna. Stat., 1936, Tit. 31, §§ 553, 582; S. D. Comp. Laws, 1929, c. 192, § [illegible]-0, p. 2493; Williams Tenn. Code, 1934, c. 15, §§ 6549, 6551; Vernon's Tex. Pen. Code, Tit. 12, c. 2, Art. [illegible]; Utah Rev. Stat., 1933, [illegible]; Vt. Pub. L., 1933, Tit. 34, c. 303, § 7724, p. 1288; Va. [illegible]; W. Va. 1932 Code, § 2036; Wis. Stat., 11th Ed. 1931, c. 98, § 98.07, p. [illegible]; cf. N. Mex. Ann. Stat., 1929, [illegible]. Three others have subjected its sale to rigid regulations. Colo. L. 1921, c. 30, § 1007, p. 440; Ore. 1930 Code, v. 2, c. XII, [illegible]; Remington's Wash. Rev. Stat., v. 7, Tit. 40, c. 13, §§ 6206, 6207, 6713, 6714, p. 360.

all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

But such we think is not the purpose or construction of the statutory characterization of filled milk as injurious to health and as a fraud upon the public. There is no need to consider it here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation. Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[4] See *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584, and cases cited. The present statutory findings affect appellee no more than the reports of the Congressional committees and since in the absence of the statutory findings they would be presumed, their incorporation in the statute is no more prejudicial than surplusage.

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543. Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as ap-

[4] There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U. S. 359, 369-370; Lovell v. Griffin, No. 391 this term, decided March 28, 1938, pamp. p. 5.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon, 273 U. S. 536; Nixon v. Condon, 286 U. S. 73; on restraints upon the dissemination of information, see Near v. Minnesota, 283 U. S. 697, 713.

plied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition, *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 349, 351, 352; see *Whitney* v. *California*, 274 U. S. 357, 379; cf. *Morf* v. *Bingaman*, 298 U. S. 407, 413, though the effect of such proof depends on the relevant circumstances of each case, as for example the administrative difficulty of excluding the article from the regulated class. *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 511-512; *South Carolina* v. *Barnwell Bros., Inc.*, No. 161 this term, decided February 14, 1938, pamp. p. 10. But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it. *Price* v. *Illinois*, 238 U. S. 446, 452; *Hebe Co.* v. *Shaw*, *supra*, 303; *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584; *South Carolina* v. *Barnwell Bros., Inc.*, *supra*, —, citing *Worcester County Trust Co.* v. *Riley*, 302 U. S. —, —.

The prohibition of shipment in interstate commerce of appellee's product, as described in the indictment, is a constitutional exercise

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714, 718-720, 722; Grosjean v. American Press Co., 297 U. S. 233; Lovell v. Griffin, *supra*; on interferences with political organizations, see Stromberg v. California, *supra*, 369; Fiske v. Kansas, 274 U. S. 380; Whitney v. California, 274 U. S. 357, 373-378; Herndon v. Lowry, 301 U. S. 242; and see Holmes, J., in Gitlow v. New York, 268 U. S. 652, 673; as to prohibition of peaceable assembly, see De Jonge v. Oregon, 299 U. S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U. S. 510, or national, Meyer v. Nebraska, 262 U. S. 300; Bartels v. Iowa, 262 U. S. 404; Farrington v. Tokushige, 273 U. S. 484, or racial minorities. Nixon v. Herndon, *supra*; Nixon v. Condon, *supra*: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428; South Carolina v. Barnwell Bros., No. 161 this term, decided February 14, 1938, n. 2, and cases cited.

of the power to regulate interstate commerce. As the statute is not unconstitutional on its face the demurrer should have been overruled and the judgment will be

Reversed.

Mr. Justice BLACK concurs in the result and in all of the opinion except the part marked *"Third."*

Mr. Justice MCREYNOLDS thinks that the judgment should be affirmed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

Mr. Justice BUTLER.

I concur in the result. Prima facie the facts alleged in the indictment are sufficient to constitute a violation of the statute. But they are not sufficient conclusively to establish guilt of the accused. At the trial it may introduce evidence to show that the declaration of the Act that the described product is injurious to public health and that the sale of it is a fraud upon the public are without any substantial foundation. *Mobile, J. & K. C. R. R.* v. *Turnipseed,* 219 U. S. 35, 43. *Manley* v. *Georgia,* 279 U. S. 1, 6. The provisions on which the indictment rests should if possible be construed to avoid the serious question of constitutionality. *Fed. Trade Comm.* v. *Amer. Tobacco Co.,* 264 U. S. 298, 307. *Panama R. R. Co.* v. *Johson,* 264 U. S. 375, 390. *Missouri Pac. R. R.* v. *Boone,* 270 U. S. 466, 472. *Richmond Co.* v. *United States,* 275 U. S. 331, 346. If construed to exclude from interstate commerce wholesome food products that demonstrably are neither injurious to health nor calculated to deceive, they are repugnant to the Fifth Amendment. *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402, 412-13. See *People* v. *Carolene Products Co.,* 345 Ill. 166. *Carolene Products Co.* v. *McLaughlin,* 365 Ill. 62. *Carolene Products Co.* v. *Thompson,* 276 Mich. 172. *Carolene Products Co.* v. *Banning,* 121 Neb. 429. The allegation of the indictment that Milnut "is an adulterated article of food, injurious to the public health," tenders an issue of fact to be determined upon evidence.